
Volume 106
Issue 3 *Dickinson Law Review* - Volume 106,
2001-2002

1-1-2002

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Recommended Citation

Gregory G. Jackson, *Punishments for Reckless Skiing-Is the Law Too Extreme?*, 106 DICK. L. REV. 619 (2002).

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Punishments for Reckless Skiing—Is the Law Too Extreme?

Gregory G. Jackson*

I. Introduction

In a decision noted to be the first of its kind in the nation,¹ the Colorado Supreme Court held that an out-of-control skier whose recklessness kills another person could face criminal charges.² In this landmark case, *People v. Hall*,³ the State of Colorado charged Nathan Hall with reckless manslaughter after a collision on the ski slopes above Vail Mountain in 1997.⁴ Had Hall been convicted,⁵ he would have faced up to six years in prison and fines of up to \$500,000.⁶ This is significant because in addition to the threat of civil liability,⁷ skiers can now find themselves serving time in prison for their behavior on the slopes.

Imposing criminal sentences for reckless skiing raises the question: Where does this penal sanction fit within the theories upon which criminal punishment is based? Unlike civil liability,⁸ sanctions for criminally deviant behavior on the ski slopes

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1. See Howard Pankrantz, *Reckless Skiers Get Red Light: State High Court Says They Can Be Charged In Deaths*, DENV. POST, Apr. 11, 2000, at A1.

2. *People v. Hall*, 999 P.2d 207, 224 (Colo. 2000).

3. *Id.*

4. *Id.* at 211.

5. After the Colorado Supreme Court ordered Hall to stand trial for reckless manslaughter, the jury found him guilty of a lesser negligent-homicide charge and he was subsequently sentenced to 90 days in jail. See generally Robert Weller, *Skier Sentenced in Collision, Experts Say 21-Year-Old is First Person Convicted of Killing Another Skier*, DETROIT NEWS, Feb. 1, 2001, at 6.

6. Deborah Frazier, *Skier to Stand Trial in '97 Vail Death For First Time in State: A Jury Will Have Chance to Define Criminally Reckless Ski Behavior*, DENV. ROCKY MTN. NEWS, Sept. 10, 2000, at 7A.

7. See *infra* Part II.B.2. and accompanying notes.

8. See *id.*

are not well established.⁹ This comment takes a close look at the *Hall* decision, the potential repercussions faced by reckless skiers, and the extent to which those punishments for reckless behavior on the ski slopes conform to the general sentencing goals of the criminal justice system.¹⁰

Society has embraced a risk-taking approach to outdoor recreational activities.¹¹ However, a problem surfaces when the present ski law is contrasted with the customary perilous approach to the sport. Skiing carries with it an inherent risk¹² as well as a widely accepted societal expectation to push extreme limits.¹³ In the criminal context, the law has not clearly defined "reckless behavior" on the ski slopes, and what is within the bounds of acceptable aggressive behavior.¹⁴ This becomes more apparent when consideration is given to society's acceptance of risky behavior coupled with the recent emergence of "extreme sports."¹⁵

The philosophy behind extreme sports has been described as an athletic revolution that puts a premium on the wagering of life and limb.¹⁶ Bearing in mind the typical risky behavior associated with the growing world of extreme sports, this comment focuses on the law as it currently relates to skiing¹⁷ in an attempt to understand what the law is trying to accomplish and whether that goal is possible.

By imposing a criminal sentence on Nathan Hall for his reckless behavior on the ski slopes, the law has failed to recognize

9. See Pankrantz, *supra* note 1; see also *infra* Part II.A. and accompanying notes.

10. See Paul Boudreaux, *Criminal Law: Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 184 (1989) ("Historically, our criminal justice system has recognized four sentencing goals: retribution, deterrence, incapacitation, and rehabilitation."); see also *infra* Part III.B. and accompanying notes.

11. See *infra* notes 61, 70 and accompanying text.

12. See generally *Cheong v. Antablin*, 946 P.2d 817, 823 (Cal. 1997) (restating the rule that recreational downhill skiers assume and accept the inherent risks of skiing); see also *infra* note 56 and accompanying text.

13. See *infra* Part II.B. and accompanying notes.

14. *Hall* is the only case on record identifying reckless skiing as a criminal offense.

15. See *infra* Part II.B. and accompanying notes.

16. Brendan I. Koerner, *Extreme: The Peril, the Thrill, the Sheer Rebellion of It All*, U.S. NEWS & WORLD REP., June 30, 1997, at 50.

17. Skiing is a sport that encourages aggressive behavior. The mass media portrays skiing as an "extreme" sport. See, e.g., ESPN's extreme sports website, available at <http://expn.go.com> (last visited Feb. 5, 2001).

the full extent of the problem concerning the aggressive behavior that exists in today's skiing community. The solution is not to sentence individuals for their reckless behavior on the ski slopes—the problem is much more complex than that. There are a series of factors that contribute to the frequency of skier collisions.¹⁸ In addition, both society's risk perception, particularly in the realm of extreme sports, and the encouragement of aggressive behavior in the skiing industry, play an important role in the occurrence of accidents on the ski slopes. Present skiing legislation fails to address these factors, and does little to contribute to the prevention of aggressive skiing.¹⁹ State legislatures should focus their attention on the causes of these accidents and create a system of preventive measures that would serve as a deterrent to today's aggressive skier. Without further development, skiers will continue to be punished for actions that the skiing community considers to be acceptable.

Risky behavior on the ski slopes is a society-driven phenomenon that is considered normal behavior by those in the industry.²⁰ Thus the question needs to be asked: How can the law, as it applies to skiing, co-exist in a world where the average person is disinclined to "play it safe" in their voyage down the mountain? This comment suggests that without more consistent enforcement coupled with efforts to curb risky behavior, the present sanctions will achieve a purely retributive effect, and will do little to prevent or change the dangerous behavior found on the ski slopes today. Accordingly, this comment presents some potential regulations that may help deter this hazardous behavior on the ski slopes.

18. Contributing problems include overcrowding, weather conditions, inexperience, inconsistent enforcement of rules and duties, contrasting levels of ability, equipment and lack of safety apparel, converging and blind approaches to slopes, difficult terrain, precarious approaches to the slopes, poor skiing etiquette, unclear danger signs, high traffic areas and ignorance of the duties of a skier.

19. See *infra* Part II.C. and accompanying notes.

20. See Paul Roberts, *Risk; Popular Leisure Activities*, PSYCHOL. TODAY, Nov. 1994, at 50. ("But in a rich and safety-obsessed country like America . . . everyday life may have become too safe, predictable, and boring for those programmed for risk-taking. . . . The safer we try to make life . . . the more people may take on risks."); see also Tony Chamberlain, *Snow Sports/On Skiing: Let's Put Dangers in Perspective*, BOSTON GLOBE, Feb. 8, 2001, at D7 ("[S]peed is [at] the very heart of a sport that, in its greatest moments, delivers a sensation nearest to flight one can have with his feet still on the ground.").

II. Background

A. Criminal Law and Skiing

Criminal prosecution of reckless skiers was instituted during the 1988-89 ski season.²¹ Whereas skiers had previously been charged with felonies in cases involving death or serious injury, guilty pleas have kept these cases out of trial courts.²² Thus, the *Hall* case was one of first impression in the courts.²³ Regarding the issue presented in the *Hall* case, Denver lawyer James Chalatz,²⁴ one of the nation's leading ski law experts, noted that:

Never before has there been a case in which the question arose, "could a person be held to answer for criminal charges for injuring or killing a person while skiing?" There is no question that someone could be held responsible for civil damages. But having to stand for criminal charges is precedent-setting.²⁵

1. *People v. Hall*—On April 20, 1997, the last day of the ski season, Nathan Hall was working as a ski lift operator on Vail Mountain²⁶ in Colorado.²⁷ After finishing his shift and after the lifts closed, Hall skied down the vacant slopes toward the base of the

21. See Robert I. Rubin, *Ski Liability Law Cuts New Trails, Reckless Skiers Face Criminal Prosecution: Victims Face Low Recovery Rates*, 26 TRIAL 108 (Oct. 1990).

22. See Frazier, *supra* note 6 (noting that the first criminal charges for reckless skiing were filed in 1988 in the death of an 11-year-old girl, and that dozens of other skiers have been prosecuted for inflicting injuries on the slopes. Nevertheless, there were no trials in these prosecutions. Nathan Hall is the first skier to face a jury for felony manslaughter.); see also Robert I. Rubin, *Ski Accident Recovery Rates on Downhill Run*, 1990 N.J. L.J. 86 (1990) (stating that criminal prosecution of reckless skiers is probably the most controversial trend in ski liability law).

23. See Pankratz, *supra* note 1.

24. James H. Chalatz is the author of several ski-law related publications, including *Liability of Skier for Collision with Another Skier*, 46 AM. JUR. PROOF FACTS 3d 1 (West 2000); *Liability of Ski Area Operator for Skiing Accident*, 45 AM. JUR. PROOF FACTS 3d 115 (West 2000); *Colorado Ski Law*, 27 COLO. LAW 5 (Feb. 1998); and *Michigan's Ski Law*, 63 MICH. B.J. 355 (May 1984).

25. Pankratz, *supra* note 1; see also CBS Evening News (CBS television broadcast, Nov. 14, 2000). Mr. Chalatz stated on the CBS evening news: "The importance of the *Hall* case is that it's the first case in which there is criminal sanctions being imposed upon the reckless skier."

26. In *Ski Magazine's* October 2000 issue, Vail Mountain is ranked the number one resort. See Erika Gonzalez, *Vail Ranked No. 1 Resort in Ski Magazine: Editor Cites Blue Sky Basin as Factor in Boosting Listing*, ROCKY MTN. NEWS, Sept. 13, 2000, at 1B.

27. *People v. Hall*, 999 P.2d 207, 211 (Colo. 2000).

mountain.²⁸ While descending down the mountain, Hall, who was skiing at a very high speed, collided with Alan Cobb, who was traversing the slope below him.²⁹ Cobb, who suffered major head and brain injuries, died as a result of the collision.³⁰

a. *Procedural History*—The State of Colorado charged Hall with reckless manslaughter.³¹ At a preliminary hearing to determine whether there was probable cause for the felony count, the county court found that Hall's conduct "did not rise to the level of dangerousness" to support a charge of manslaughter, and therefore dismissed the charge.³² The district court affirmed the lower court's finding on probable cause and concluded that Hall's conduct on the ski slope did not constitute a "substantial and unjustifiable" risk of death.³³ However, the Colorado Supreme Court reversed the decision, finding that Hall's conduct created a substantial and unjustifiable risk of death to another person.³⁴

b. *The Decision*—In applying Colorado's criminal code on recklessness,³⁵ the Colorado Supreme Court stated that a risk does not have to be "more likely than not to occur" or "probable" in order to be substantial.³⁶ Further, the court stated that a risk might be substantial even if the chance that harm will occur is "well below fifty percent."³⁷

Viewing the evidence in the light most favorable to the prosecution, the court described Hall's conduct as skiing straight down a steep and bumpy slope with his weight back on his skis and his arms out to his sides, being off-balance and thrown from mogul to mogul, being out of control for a considerable distance and period of time, and travelling at a high speed.³⁸ The court focused on Hall's subjective awareness of the risk (that his behavior could cause the death of another) by reviewing his aggressive style of skiing and his particular knowledge and expertise.³⁹ Hall's experience as a trained ski racer and knowledge about control and

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 210.

32. *Hall*, 999 P.2d at 210-11.

33. *Id.* at 211.

34. *Id.*

35. *See* COLO. REV. STAT. § 18-1-510(8) (2000) ("A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.").

36. *Hall*, 999 P.2d at 217.

37. *Id.*

38. *Id.* at 222.

39. *Id.* at 223.

skiing safety contributed to the court's decision.⁴⁰ In addition to Hall's subjective awareness, the court looked at the particular situation from an objective standpoint to determine whether a reasonable person would have understood the risk under similar circumstances.⁴¹ The court believed that a reasonable person with expert training and knowledge of skiing should have realized that skiing at very high speeds without enough control to stop or avoid a collision could seriously injure or kill another skier.⁴²

In an attempt to limit the scope of its decision, the Colorado Supreme Court noted that skiing too fast for the conditions is not widely considered behavior that constitutes a high degree of risk.⁴³ The court recognized that the nature of the sport involves moments of high speeds and temporary losses of control,⁴⁴ and noted that death by collision is a rare occurrence in skiing.⁴⁵ Nevertheless, under the specific facts of the *Hall* case, the court found it both subjectively and objectively reasonable to infer that Nathan Hall created a substantial and unjustifiable risk that could cause another's death⁴⁶ and that he consciously disregarded that risk.⁴⁷

The existing law relating to civil liability on the ski slopes assisted the Colorado Supreme Court in reaching its decision regarding acceptable skiing behavior.⁴⁸ The court referred to the duty imposed on a skier to avoid collisions with any person or object below him,⁴⁹ stating that a violation of a skier's duty in an extreme fashion, such as here, may be evidence of conduct that

40. *Id.*

41. *Hall*, 999 P.2d at 220.

42. *Id.*

43. *Id.* at 222.

44. *Id.* at 223.

45. *Id.* at 224.

46. *Hall*, 999 P.2d at 223.

47. *Id.* at 224.

48. *See id.* at 223 (referring to Colorado's Ski Safety Act, COLO. REV. STAT. § 33-44-109 (2000), which, although it does not form the basis of criminal liability, does establish the minimum standard of care for uphill skiers and, for the purpose of civil negligence suits, creates a rebuttable presumption that the skier is at fault whenever he collides with skiers on the slope below him); *see also* *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 517 (Colo. 1995) (stating that the purpose of the Ski Safety Act is to establish reasonable safety standards and to define relative rights and responsibilities of ski area operators and skiers).

49. *See* COLO. REV. STAT. §§ 33-44-109(1), (2), (5) (2000). The Colorado Ski Safety Act provides that skiers have the duty to maintain a lookout so as to avoid collisions, to ski within their ability, to remain in control, and to refrain from acting in a manner that may cause or contribute to injury of the skier or others. It also states that the "primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him." *Id.*

constitutes a “gross deviation” from the standard of care imposed by statute for civil negligence.⁵⁰

2. *Civil Liability in Skiing*—Unlike criminal liability, tort law pertaining to skiing is well established.⁵¹ Some of the earliest lawsuits regarding accidents occurring on the ski slopes arose from skier collisions.⁵² The concept of “rules of the road” finds its origin in a 1967 case,⁵³ in which the court applied a rule of law taken from automobile accidents, that to look but fail to see that which was plainly visible was the same as failing to look at all.⁵⁴ Since this “rules of the road” notion was instituted, several states have codified their common law standards into ski safety legislation.⁵⁵ Ski statutes vary from state to state, although most statutes recognize that skier collisions are an inherent danger of skiing.⁵⁶

Courts may, as the Colorado Supreme Court did in the *Hall* case, use the standards set out in the existing civil liability ski law as guidelines to help determine, in a criminal context, what is appropriate behavior on the ski slopes.⁵⁷ However, these Ski Safety Acts were not intended to create a criminal code of conduct on the ski slopes. Instead, they are the minimum standards relevant to the civil liability of an inherently risky sport. Therefore, these tort standards are not appropriate to use as the sole basis upon which criminal liability is established—especially when one considers the growth of extreme sports and the accompanying expectation of aggressive and risky behavior.⁵⁸ As extreme sports become more

50. *Hall*, 999 P.2d at 223.

51. See, e.g., *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786 (Vt. 1951) (first reported ski accident case).

52. The first skier collision case to apply ordinary negligence standards was *Ninio v. Hight*, 385 F.2d 350 (10th Cir. 1967), which held that a skier has a duty to use reasonable care to look out and the failure to see that which must have been plainly visible amounted to negligence.

53. See *id.* at 351.

54. *Id.*

55. For example, several states have made it a statutory presumption that the primary duty is on the uphill skier to avoid collisions with skiers below. See, e.g., COLO. REV. STAT. §§ 33-44-109(1), (2), (5) (2000); NEV. REV. STAT. ANN. § 445A.110(5) (Michie 2000); OR. REV. STAT. § 30.985(1)(f) (2000).

56. See, e.g., ALASKA STAT. § 05.45.010 (Michie 2000); COLO. REV. STAT. § 33-44-109 (2000); 42 PA. CONS. STAT. ANN. § 7102 (West 2000); UTAH CODE ANN. § 78-27-51 (2000); VT. STAT. ANN. tit. 12, § 1037 (2000).

57. See *Hall*, 999 P.2d at 223; see also *supra* notes 48-50 and accompanying text.

58. See generally Arthur N. Frakt & Janna S. Rankin, *Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability*, 28 IDAHO L. REV. 227, 250 (“The one-sidedness of this provision is even more obvious when ski advertising literature and the nature of the sport itself are considered. All insistently challenge the skier to progress to higher levels of performance.”); see

popular, the trend in risky behavior will correspondingly increase, thereby adding further risks to a sport already recognized as inherently dangerous. Insight into the mental set of aggressive downhill skiers can be gleaned from a look into extreme sports.

B. *What Are Extreme Sports?*

"Extreme sports" can be broken down into two separate yet interrelated categories. In one sense, "extreme" is a buzzword, a moniker created by marketers,⁵⁹ which has been adopted by society to describe various outdoor recreational activities.⁶⁰ In the other sense, it is an athletic revolution or cultural movement that is growing faster than ever before.⁶¹ This subculture provides its participants more than physical risks; it provides the opportunity to create a separate identity, thus allowing the participants to differentiate themselves from the dominant and more conservative culture.⁶²

1. *The Growing Market of Extreme Sports*—"The rising popularity of extreme sports bespeaks an eagerness on the part of millions of Americans to participate in activities closer to the metaphorical edge, where danger, skill and fear combine to give weekend warriors and professional athletes alike a sense of pushing out personal boundaries."⁶³

also *infra* Part II.B.1. and accompanying notes.

59. See Koerner, *supra* note 16; see also Bill Kerig, *Extreme Insider: What's It Like to Compete in an Extreme Contest*, SKIING, Dec. 1997, at 82.

60. In addition to skiing and snowboarding, these outdoor activities include water skiing, mountain biking, in-line skating, bungee jumping, skateboarding, sky surfing, rock climbing, canyoning, paragliding, parachuting, hang-gliding, mountain climbing, whitewater rafting, kayaking, and windsurfing. See generally *supra* note 17.

61. See CNN Talkback Live (CNN television broadcast, July 29, 1999). Guest Amy Schrier, the founder and editor of *Blue*, an adventure-lifestyle magazine, stated: "[T]here's also a far more vast mainstream revolution in participation in outdoor recreation, action sports, and also, adventure travel." See also Karl Taro Greenfeld, *Life On the Edge: Is Everyday Life Too Dull? Why Else Would Americans Seek Risk as Never Before?* TIME, Sept. 6, 1999, at 28 ("Heading into the millennium, America has embarked on a national orgy of thrill seeking and risk taking.").

62. See A. Brannigan & A.A. McDougall, *Peril and Pleasure in the Maintenance of a High Risk Sport: A Study of Hang-Gliding*, Vol. 6, No. 1, J. SPORT BEHAV. 37, 45 (1980) ("By immersing oneself in that culture, acquiring the nuances of the argot and dress, one can communicate and interact effectively and smoothly.").

63. Greenfeld, *supra* note 61.

Extreme sports have been growing and continue to grow throughout the United States.⁶⁴ The way in which corporate America has brought the lingo and culture of the extreme world into everyday simple products is an indication of its popularity.⁶⁵ In a world of airbags, birth control, and safety helmets, the leisurely pursuit of danger is a booming industry.⁶⁶ Due to television, movies and print media exposing millions of North Americans to high-risk sports, these activities find themselves in the center of the recreational mainstream.⁶⁷ In 1995, ESPN started its highly successful Extreme Games (also known as the "X Games"), which combined corporate sponsorship, global exposure and twenty-seven extreme sporting events.⁶⁸ As these sports continue to grow, it is likely that injuries and deaths will increase.⁶⁹ Perhaps with appropriate legislation addressing these sports, the hazards that have come to be associated with extreme sports could be alleviated, or at least substantially diminished.

2. *The People, the Culture, and the Risky Behavior*—Why do people do it? Individuals participate in these activities for the thrill of taking risks, of pushing their bodies to the limits, and the adrenaline rush that comes from flirting with greatness or death.⁷⁰

64. Studies show that participation in extreme sports is on the rise: Snowboarding has grown 113% in five years and now boasts nearly 5.5 million participants. Mountain biking, skateboarding, scuba diving, you name the adventure sport—the growth curves reveal a nation that loves to play with danger. Contrast that with activities like baseball, touch football and aerobics, all which have been in steady decline throughout the '90s.

Id.

65. Countless advertising slogans can be found that mimic the energy of the extreme world. "X Games sponsor Pringles, the wafer-thin potato chips that come in a can, commands consumers to 'Slam the Stack!'; Mountain Dew, Pepsi-Cola's nerve-jolting soda, which has carved its niche with commercials depicting gnarly dudes scampering up rocks and jumping off radio towers, screams, 'Do the Dew!'" See Koerner, *supra* note 16.

66. For example, mountain climbing finds itself among America's fastest-growing sports. See Roberts, *supra* note 20.

67. See Brannigan & McDougall, *supra* note 62.

68. See Anne M. Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events*, 7 MARQ. SPORTS L.J. 77, 102-03 (1996) (The games were sponsored by Miller Lite Ice, Taco Bell, Mountain Dew, Chevy Trucks, Pontiac Sunfire, ASG by Nike, AT&T and Advil. In addition, the games were aired in more than 100 countries, promoted in sixteen television spots airing 2000 times on ESPN networks, and advertised on national radio and in Sports Illustrated.).

69. See generally *infra* notes 77-78 and accompanying text.

70. See generally Brannigan & McDougall, *supra* note 62, at 45 ("The fact that these feats are pleasurable, that they are exciting and offer one the opportunity to exercise control over one's immediate destiny, suggests that they are self-

As William James wrote more than a century ago in *Is Life Worth Living*: "It is only by risking our persons from one hour to another that we live at all."⁷¹ American society identifies itself with risk takers.⁷² Our founding fathers, frustrated with the English Crown, jeopardized everything they had to move to the New World—today we glorify these risk takers, calling them "pioneers."⁷³ We embrace those who took perilous chances when the odds were against them, calling them heroes.⁷⁴ The reality is that in society today, more people (not limited to extreme sports participants) are taking greater risks than in any other generation.⁷⁵ Individuals who participate in extreme sports typically understand the consequences, although they tend to focus their energy on success rather than the alternative.⁷⁶ This influx of risky behavior and an unrealistic optimism toward susceptibility to injury sums up the modern day extreme skier—young, aggressive, and fearless.

The activities involved in extreme sports are generally dangerous in comparison to regular team oriented sports such as football or soccer.⁷⁷ For most extreme athletes, broken body parts

perpetuating. The exhilaration is inherent and essential to the activity.").

71. WILLIAM JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 32, 59 (Dover Publications 1956) (1895).

72. Greenfeld, *supra* note 61.

73. *Id.*

74. *Id.* (naming Lewis and Clark, Thomas Edison, Frederick Douglass, Teddy Roosevelt, Henry Ford, Amelia Earhart).

75. *See id.* (discussing the social behavior of stock market investors being prone to more hazardous transactions, the amount of unprotected sex being on the upswing, and the amount of people changing jobs thoughtlessly); *see also* Gary E. Machlis & Eugene A. Rosa, *Desired Risk: Broadening the Social Amplification of Risk Framework*, Vol. 10, No. 1 RISK ANALYSIS 161, 163 (1990) (noting that amusement park operators have reported that when a fatality occurs on one of the rides, the ride becomes even more popular when it is reopened); Jeffrey Arnett, *Still Crazy After All These Years: Reckless Behavior Among Young Adults Aged 23-27*, Vol. 12, No. 2 PERSONALITY & INDIVIDUAL DIFFERENCES 1305, 1309-10 (1991) (finding that reckless sexual behavior and high risk driving was found to be quite prevalent among young adults).

76. *See, e.g., CNN Talkback Live* (CNN television broadcast, July 29, 1999) (quoting professional skysurfer Brian Rogers: "[W]e think about the consequences, but not while we are doing it.").

77. *See* Greenfeld, *supra* note 61.

More Americans than ever are injuring themselves while pushing their personal limits. In 1997 the U.S. Consumer Products Safety Commission reported that 48,000 Americans were admitted to hospital emergency rooms with skateboarding-related injuries. That is 33% more than in the previous year. Snowboarding emergency room visits were up 31%; mountain climbing up 20%. By every statistical measure available, Americans are participating in and injuring themselves through adventure sports at an unprecedented rate.

Id.; *see also* National Ski Patrol's website, available at <http://www.nsp.org/>

are a fact of life. For example, in 1995, over 100,000 in-line skaters ended up in the emergency room.⁷⁸

The thrill and risk of these extreme sports is the attraction that has led to a movement with its own culture.⁷⁹ This culture serves as a breeding ground for the kind of behavior that causes accidents on the ski slopes. As those consumed by extreme sports integrate with the skiing world, the result will be the demise of the traditional skiing religion and the creation of an extreme skiing cult. The skiing world as we know it will become too dangerous and aggressive for the average person to enjoy. The law needs to address this extreme sports "culture" or the sport of skiing, if not both.

C. Existing Legislation

1. *Skier Safety Laws*—Colorado's Ski Safety Act of 1979, designed to articulate the responsibilities of skiers and resort operators, requires ski resorts to maintain sign systems that warn skiers of dangers other than those inherent in the sport.⁸⁰ However, the ultimate responsibility of safe skiing is not on the resorts, but on the individual skiers.⁸¹ The existing law places a duty on skiers to know the range of their abilities and to ski within those limits, to maintain control of speed and course at all times, and to refrain from acting in a manner that may cause or contribute to the injury

safety/howsafe.asp#Injuries (last visited Feb. 5, 2001) ("According to the National Ski Areas Association: During the past 13 years, about 34 people have died skiing per year on average. Serious injuries (paraplegic, quadriplegic, serious head injury, comas and other spinal injuries) occur at the rate of about 29 per year."); *An Extreme Challenge: Alternative Sports Marketing*, 5 SELLING TO KIDS 15 (2000) ("As participation and viewership numbers for traditional sports have gone down, sports like these have witnessed participation growth rates that are on average around 35%, and in some cases much higher.").

78. Koerner, *supra* note 16; see also Sheila Globus, *Going to Extremes—Safely: Safety and Extreme Sports*, CURRENT HEALTH 2, Mar. 1, 1999, at 16 ("No doubt about it, adventure sports are high-risk. They demand complete concentration, preparation, and stamina.").

79. See *An Extreme Challenge: Alternative Sports Marketing*, *supra* note 77 ("The language barrier and other nuances that separate these sports from the mainstream are what make them so popular.").

80. See Tom Wolf, *Lawsuits Could Tame Ski Slopes*, DENV. POST, Nov. 26, 2000, at I2.

81. See Steve Lipsher, *Charges in Skier Collisions Not New, But Hall Case Was 1st Involving Homicide*, DENV. POST, Nov. 24, 2000, at B1 (quoting Jack Mason, the mountain manager for Winter Park and former longtime director of the ski patrol: "Your responsibility code is codified in state law. We take it very seriously.").

of oneself or others.⁸² This statute however, was constructed to create general guidelines upon which to bring civil actions. The only suggestion of criminal liability in the entire Ski Safety Act applies to violations such as skiing on "closed" trails, skiing under the influence of alcohol or drugs, leaving the scene of a collision with another skier in which an injury results, or entering private lands from an adjoining ski area.⁸³ Moreover, the Colorado Ski Safety Act offers its own provision that specifically addresses violations of the statute in the context of civil lawsuits, without doing so for criminal actions.⁸⁴

Colorado is not alone in its failure to adequately address the criminal consequences of a skier's violation of the Ski Safety Act.⁸⁵ For example, Nevada and Oregon both impose a duty on skiers to maintain control and conduct while skiing, yet neither state adequately provides for means that would deter this behavior.⁸⁶ Rather, these statutes only go so far as to grant authority to ski operators to revoke a violator's privilege to ski.⁸⁷ This mere slap on the wrist sends a dangerous skier home, in essence grounded, only to return to play the next day.

By allowing criminal charges for reckless skiing to go to trial, the Colorado Supreme Court set precedence for the application of the Ski Safety Act in the criminal context. According to insiders in Colorado's ski industry, it is not the actual guilt of Nathan Hall that is meaningful, but the fact that snow-riders can now stand trial in a criminal court as opposed to civil court.⁸⁸ The *Hall* case, as well as

82. COLO. REV. STAT. §§ 33-44-109(1), (2), (5) (2000).

83. *Id.* § 33-44-109(12) (providing for a class 2 petty offense with a maximum fine of \$300).

84. *Id.* § 33-44-104(1) (titled: "Negligence—Civil Actions") ("A violation of any requirement of this article shall, to the extent such violation causes injury to any person or damage to property, constitute negligence on the part of the person violating such requirement.").

85. *See, e.g.,* VT. STAT. ANN. tit 12, § 1038(c) (2000) (specifically addressing civil actions for skiing collisions); UTAH CODE ANN. § 78-27-51 (2000) (restricting people injured from skiing from recovering from a ski operator for injuries resulting from the inherent risks of skiing).

86. *See* NEV. REV. STAT. ANN. §§ 455.100(5), (6) (Michie 2000) (providing for duties to maintain proper lookout and control of speed, and to conduct oneself in a manner so as to avoid injuries to persons or property); OR. REV. STAT. § 30.985(1)(b) (2000) (providing that skiers are the sole judges of their skill limits and ability to meet and overcome the inherent risks of skiing, and are to maintain reasonable control and speed).

87. *See* NEV. REV. STAT. ANN. § 455A.180 (Michie 2000); OR. REV. STAT. § 30.985(2) (2000).

88. *See* Jason Blevins, *Ski Industry Cites Precedent in Trial: High Court Ruling Paved Way for Charges*, DENV. POST, Nov. 17, 2000, at B1 ("The case has helped to push the skier safety code into the public arena. The common-sense code,

the plethora of civil law suits brought each year pertaining to reckless skiing, should signal to the ski industry that it needs to consider whether the existing Ski Safety Acts should be amended to further protect skiers. These Acts are insufficient because of their failure to anticipate the development of criminal sanctions for aggressive behavior on the ski slopes. Accordingly, a new code specific to criminal liability for skiing is necessary. Ideally, such a code would outline standards for skiers and codify specific criminal sanctions for violations thereof.

2. *The Absence of Legislation in Other Extreme Sports*—Very few states have legislation regulating outdoor activities beyond the realm of snow skiing. The few statutes that do exist serve the purpose of limiting liability for injuries that occur on public land,⁸⁹ or for purposes unrelated to defining acceptable standards of behavior while performing these activities.⁹⁰

However, the lack of statutory development does not mean that those who act recklessly are completely insulated from criminal liability. In 1996, six individuals participated in BASE jumping⁹¹ in Yosemite National Park, which resulted in the death of one of the participants.⁹² The other five members of the group were subsequently convicted of “illegal air delivery and recovery,” a misdemeanor.⁹³ The defendants each received a \$2,000 fine and one year of supervised probation.⁹⁴

Oftentimes it is difficult to regulate the particular extreme sport activity due to the lack of common knowledge about that activity. These sports are continuing to develop, and because people are becoming more innovative in pursuing outdoor recreation, the law is unable to anticipate the dangers that are

which dates to the 1930s, demands that snow-riders shoulder some responsibility in keeping ski hills safe.”).

89. See, e.g., CAL. GOV'T CODE § 831.7 (West 2000) (stating that neither public entity nor public employee is liable for any person who participates in hazardous recreational activities such as mountain biking, kayaking, or hang gliding).

90. See, e.g., UTAH CODE ANN. § 72-11-201 (2000) (declaring that the purpose of passenger ropeways is not to protect from the inherent hazards in the sports of mountain biking).

91. BASE jumping (an acronym for building, antennae, span, and earth) entails free-falling off high objects and relying on nothing but a small, self-packed parachute. See generally Kevin Collins, *Access or Excess?*, NAT'L PARKS, July 1, 2000, at 42.

92. See Todd Wilkinson, *Caught in a Free Fall*, NAT'L PARKS, Aug. 1999, at 26.

93. *Id.*

94. *Id.*

forthcoming.⁹⁵ For this reason, regulating individual extreme sports becomes an impractical task for legislatures. However, the problem is not going to solve itself. An alternative to enacting legislation would be the creation of a committee that would investigate the prime areas of concern, and work with those in the industry to advance educational and safety awareness programs.

III. Analysis

A. Criminal Punishment for Reckless Skiing

Understandably, dangerous and reckless behavior resulting in the death of another human being should be punished. But as the theories behind penal sanctions are applied to recreational activities such as skiing, especially because extreme sports are encouraged in today's society, it is unclear whether criminal penalties will be effective or even applicable. There is often a fine line between an innocent mistake that results in an accident and recklessness.⁹⁶ Certainly, the ski industry does not want its customers arrested and jailed for simple errors in judgment.⁹⁷ Those participating in extreme sports do not want to find themselves behind bars for acting within what they believe to be the parameters of acceptable behavior.⁹⁸ Hall's decision to ski down Vail Mountain as fast as he did was clearly an error in judgment. However, his decision was not so outrageous⁹⁹ as to warrant incarceration for up to six years.¹⁰⁰

95. See *id.* (quoting Yosemite public affairs officer Kendell Thompson: "How can you tell people they can't do something if you don't even have a name for what they are doing? . . . [E]ach year more people are finding more innovative ways to pursue outdoor recreation.").

96. See Rubin, *supra* note 22.

97. See *id.*

98. Without knowledge of the dangers and deaths that are present in the sport of skiing, it is unlikely that participants are aware that they could end up in jail for skiing in the aggressive fashion they see exhibited on television commercials. See generally Reed L. Levine & Bernard S. Gorman, *Skiers' Perceptions of Danger as a Function of Awareness of Fatalities*, Vol. 17, No. 1 J. SPORT BEHAV. 17 (1993) ("Skiing is a potentially dangerous sport and fatalities do occur. However, it is unclear as to whether such information is widely disseminated among skiers."); Reed L. Levine, *Ski Injuries and Knowledge of Fatalities: An Intimate Link*, 45 PSYCHOL. REC. 23 (1995) ("Relatively high rates of ski-related deaths among younger skiers may be best explained as a function of the relative ignorance of injuries and deaths on the part of younger participants.").

99. See generally Chamberlain, *supra* note 20 ("Who among us has not on occasion skied too fast for the conditions, barely missed a collision or become impatient on a crowded trail and skirted out to the edge to pass slower skiers?").

100. Nathan Hall is not the first, nor will he be the last person to attack the mountain in such an aggressive manner. To the contrary, this style of skiing is

To determine whether there was a conscious disregard of a substantial risk, the Colorado Supreme Court looked at Hall's subjective awareness of the risk, placing emphasis on his experience as a member of his high school skiing team.¹⁰¹ In reality, anyone skiing with such reckless abandon and at such a high speed down Vail Mountain is likely an experienced skier with a skill level that is far beyond that of the average skier. That person's experience would reflect an expert knowledge of skiing, which, in essence, would provide for a subjective awareness similar to Nathan Hall's. Because of this, it is evident that under the ruling in *Hall*, any person who skies down Vail Mountain at a speed fast enough to be considered "out of control" may have the requisite subjective awareness to make them criminally liable for any accidents that might occur. Further, the court stated that the risk might be substantial even though the chance that harm will occur is "well below fifty percent."¹⁰² If this is how the law is to be construed, then how can anyone ever justify skiing in an extreme fashion?

Objectively speaking, it is not unreasonable to assume that death is possible any time one skis at a high speed, just as death can occur anytime one drives a car. Even the statutes pertaining to skier's liability recognize the inherent dangers associated with skiing.¹⁰³ Contrast this with what is shown in magazines, on television and instilled upon the general public through ski industry marketing and extreme sports enthusiasts.¹⁰⁴ Therein lies the problem, particularly for the youthful participant: Should he ski under control because he doubts his own ability, or should he try to emulate the image that is portrayed in society, and tear down the mountain with reckless abandon?

Individuals aspire to ski aggressively—just as they want to mountain bike fast, climb high mountains, and kayak violent rivers. All of these activities entail substantial risks that harm will occur, including death. An extension of the *Hall* ruling would mean that

more common than ever before, and given America's thirst for extreme sports, the number of aggressive skiers is likely to increase. See generally *supra* Part II.B. and accompanying notes (discussing the growth of extreme sports).

101. *People v. Hall*, 999 P.2d 207, 223 (Colo. 2000) ("Hall is a trained ski racer who had been coached about skiing in control and skiing safety.").

102. *Id.* at 217.

103. See *supra* note 56 and accompanying text.

104. See generally Wilkinson, *supra* note 92 (quoting Larry Van Slyke, Chief Ranger at Canyonlands National Park: "Sometimes I think of the countless hours of television advertising bombarding people, especially young people, who get caught up in the message of how hip it is to be extreme.").

any time someone participating in these activities¹⁰⁵ has the misfortune of colliding with and injuring another person, that participant has consciously disregarded a substantial risk.¹⁰⁶

No existing law provides for criminal sanctions for the act of skiing too aggressively down a mountain.¹⁰⁷ If Nathan Hall had skied down that mountain in the same manner, but had the good fortune to not have a collision, it is unlikely that he would have been sanctioned.

B. Criminal Theories Behind Punishment

The criminal law attempts to force obedience—or to discourage disobedience—by punishing offenders.¹⁰⁸ The four traditional justifications for criminal punishment include: 1) retribution, 2) deterrence, 3) incapacitation, and 4) rehabilitation.¹⁰⁹ Because criminal sanctions for aggressive skiers are a new phenomenon, Hall's potential punishment will be analyzed under these four rationales.

1. *Retribution*—Perhaps the court in *Hall* did not intend to send a message to the skiing world with its holding that reckless skiers can be guilty of reckless manslaughter. Rather, the court may have felt that because an innocent man was killed, the person responsible, regardless of his lack of intent, should be punished. Therefore, six years in prison represented retribution for Nathan Hall's decision to ski too fast on Vail Mountain. Retribution generally holds that a wrongdoing merits punishment, and that

105. Provided they approach these sports in the aggressive manner discussed in the section on extreme sports. See *supra* Part II.B. and accompanying notes.

106. For example, take Vail Mountain in the summer. Suppose John Doe, an expert mountain biker, is racing down the mountain in a manner similar to Nathan Hall's skiing—very fast, taking jumps, unable to make an immediate stop. Now assume that on his descent, John collides with another biker, killing that person. Following the logic of the *Hall* case, John should be charged with reckless manslaughter. With his mountain biking experience, John should have known that riding down that mountain at that speed could bring about death, even if that chance is well below fifty percent. In this hypothetical, the law ignores the fact that people race down mountains at high speeds without any worry of criminal sanctions. It overlooks the aggressive nature of the sport, and disregards the fact that this behavior is not considered deviant, but is viewed by many as a legitimate approach to the world of mountain biking.

107. As of January 30, 2001, no state has a law pertaining to criminal sanctions and a skier's duty to ski safely, with the exception of trespassing or skiing while intoxicated. See *supra* note 83 and accompanying text.

108. CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW 2 (15th ed. 1993).

109. See Boudreaux, *supra* note 10, at 184.

punishing the offender is warranted, regardless of any consequences of the punishment on the wrongdoer.¹¹⁰

There are actually two premises upon which the theory of retribution rests.¹¹¹ The first is when the court orders the guilty defendant to make restitution to the victim.¹¹² Clearly in Hall's situation it is not possible for him to repay Alan Cobb. The second is when the state requires that the convicted defendant make restitution to society itself.¹¹³ Put another way, when one commits a crime, retributive theory contends that it is important for the criminal to receive a commensurate punishment in order to restore societal "peace of mind."¹¹⁴ Under this theory, the state might have demanded that Nathan Hall pay society for his aggressive behavior by serving six years in prison.

Regardless of the risky behavior that typically accompanies extreme sports, under the retributive theory, a guilty verdict warrants punishment.¹¹⁵ Clearly, retribution was one, if not the only, reason for punishing Nathan Hall.¹¹⁶

2. *Deterrence*—When a criminal is apprehended it is too late to deter that person from committing that particular crime. In theory, members of society will be less inclined to engage in a deviant activity if it is commonly known that (if apprehended) such participation will result in a harsh punishment.¹¹⁷ In order for this to be effective, society needs to know that the activity or behavior is considered deviant, and understand that participating in the activity

110. William L. Barnes, Jr., *Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627, 635 (1999); see also *Commonwealth v. Ritter*, 13 Pa. D. & C. 285 (1930) (stating that retribution may be regarded as the doctrine of legal revenge, or punishment merely for the sake of punishment); GEORGE E. RUSH, *THE DICTIONARY OF CRIMINAL JUSTICE* 285 (Dushkin/McGraw-Hill) (5th ed. 2000) ("The theory behind retribution is simply 'an eye for an eye, a tooth for a tooth.'").

111. See Wayne R. Cohen, *The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation*, 7 U. MIAMI ENT. & SPORTS L. REV. 311, 320 (1990).

112. Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 398 (1996).

113. *Id.*

114. GRAEME NEWMAN, *THE PUNISHMENT RESPONSE* 190 (Harrow & Heston 1985) ("The punishment is fashioned to closely resemble the criminal offense.").

115. See *id.* at 196 ("Punishment, they say, is never justified unless an offender is found guilty of a particular offense.").

116. Although retribution is no longer the dominant objective in criminal law, see *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), it must always be an essential element in any form of punishment, see CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW 15 (15th ed. 1993).

117. See Barnes, *supra* note 110, at 630.

justifies criminal punishment.¹¹⁸ However, in today's society, it is doubtful that people know or respect the fact that skiing too fast down a mountain can lead to death,¹¹⁹ let alone incarceration.

Apparently, the reason for punishing Nathan Hall was for the deterrent effect it would have on the skiing community. District Attorney Mike Goodbee, who prosecuted the case, hoped the decision would bring about a heightened awareness among skiers.¹²⁰ Following the Colorado Supreme Court's ruling, Mr. Goodbee stated: "I think we made the ski world a little bit safer world today."¹²¹ National Ski Areas Association president Michael Berry thinks the decision will help deter high-risk individuals from skiing in a dangerous manner.¹²²

"Under the deterrence principle, society discourages participation in criminal activity through punishment."¹²³ The theory is that a potential offender will refrain from committing a crime if he is mindful that as a result he will suffer grave consequences.¹²⁴ If society is unaware of the possibility of incarceration for skiing in the very manner that they see depicted in magazines and videos (thus creating a belief as to how the sport is intended to be carried out), then those penal sanctions are ineffective in deterring that behavior.

118. See *United States v. Harriss, et al.*, 347 U.S. 612, 617 (1954) ("No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."); see also *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("A reasonable fair warning of the law should be given to the world in language the common world will understand.").

119. See *Levine & Gorman, supra* note 98; see also *People v. Hall*, 999 P.2d 207, 224 (Colo. 2000) (recognizing that death resulting from skier to skier collisions is a "rare occurrence").

120. See Steve Lipsher, *DA: Skier Case No Attack on Industry: Prosecutors Hope Greater Awareness Will Boost Safety*, DENV. POST, Nov. 21, 2000, at B4.

121. Bill Johnson, *Vail Ski Collision was Only Accident*, ROCKY MTN. NEWS, Nov. 19, 2000, at 6A.

122. See Scott Willoughby, *Safety the Hot Issue: Upcoming Week Becomes Especially Important*, DENV. POST, Jan. 11, 2001, at D12 (quoting NSAA president Michael Berry: "We think it's more of a question of what will 'high risk' individuals be doing differently? Never before have patrollers been able to tell reckless, inconsiderate individuals they could wind up in jail for their gross slope conduct.").

123. Dugger, *supra* note 112, at 400.

124. See *id.*; see also *Wallace v. State*, 204 Ind. 68, 76 (1932)

The purpose and object of punishment, in criminal cases, is to deter others from crime and thus protect the community, as well as . . . to reform the offender. On the one hand punishment will not be inflicted unless deserved, while on the other hand, it will not be imposed unless for conservation of the public good.

Id.

In theory, potential criminals will weigh the hazards involved (the costs) against the possible gains (the benefits) of a particular deviant activity. The deterrence principle works to influence the conscious desire of those individuals to behave lawfully.¹²⁵

Applied to skiing, the potential offender balances the thrill of skiing down the mountain at a high speed against the repercussions for doing so. If this person is not cognizant of the risk of death or the potential for imprisonment, then this person is unable to balance the costs of his behavior against its benefits.¹²⁶

Even if the person knows about the result of the *Hall* case (six years in prison), that does not mean his approach to the mountain will change. People generally have a tendency to expect misfortune to happen to others and not themselves.¹²⁷ Studies have shown that these optimistic biases do not result from a lack of information about their activities, but from a failure to think carefully about the consequences of their actions.¹²⁸ The fact that one person went to jail for his reckless skiing is not sufficient to discourage what is essentially considered normative behavior.

3. *Incapacitation*—Incapacitation is also commonly known as “separation” or “neutralization,” and focuses on removal.¹²⁹ The theory behind incapacitation is simply to deprive an offender of freedom, ability, qualification or legal power.¹³⁰ In other words, if the offender is considered dangerous, then put the criminal away

125. See Dugger, *supra* note 112, at 400; JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE 36 (University of Michigan Press 1974).

126. Dugger, *supra* note 112.

127. See S.E. TAYLOR, HEALTH PSYCHOL. 73 (McGraw-Hill 1995) (“Research demonstrates that people hold an unrealistic optimism about the likelihood that they will develop major health problems.”).

128. See, e.g., Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems*, 5(4) J. BEHAV. MED. 441 (1982) (noting that people consistently consider their own chances for health and life-threatening problems to be below average); Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample*, 10(5) J. BEHAV. MED. 481 (1987) (maintaining that optimistic biases are not limited to particular age, sex, educational, or occupational group); Neil D. Weinstein & Elizabeth Lachendro, *Egocentrism as a Source of Unrealistic Optimism*, 8(2) PERSONALITY & SOC. PSYCHOL. BULL. 195 (1982) (supporting the theory that egocentrism contributes to unrealistic optimism).

129. Dugger, *supra* note 112, at 401.

130. Rush, *supra* note 110, at 167.

and save society.¹³¹ Place these offenders in their own community and prevent that community from integrating with society.¹³²

Like deterrence, the effect of punishing an aggressive skier by incapacitating him is fundamentally flawed. If a person does not intend to commit a crime, and is unlikely to continue to harm society, then it does not logically follow to incapacitate this person. Society is not protected by the fact that Hall or some other aggressive skier is in prison. Aggressive skiers are not the type of violent offenders that warrant removal from society. These individuals do not pose a substantial threat that justifies spending taxpayer dollars incarcerating them in an already overpopulated penal system.

4. *Rehabilitation*—As a sentencing goal, rehabilitation focuses on benefiting the criminal as well as society.¹³³ In theory, rehabilitation seems to be a more progressive sentencing goal than deterrence or incapacitation.¹³⁴ As such, the criminal is “reformed” throughout the course of his or her punishment.¹³⁵ This is the result of counseling, skills training and educational opportunities offered to those in the correctional system.¹³⁶ Ideally, rehabilitation seeks to successfully reintegrate the offender into society, where the

131. See CURT R. BARTOL, *CRIMINAL BEHAVIOR, A PSYCHOLOGICAL APPROACH* 356 (Prentice-Hall Inc. 1980); see also JAMES Q. WILSON, *THINKING ABOUT CRIME* 146-47 (rev. ed. 1983). For incapacitation to be successful, three conditions must be present in society: that some criminals are repeat offenders, that offenders taken off the streets are not immediately replaced by new recruits, and that prisons are not “schools of crime.” *Id.*

132. Dugger, *supra* note 112, at 401.

133. *Id.* at 402.

134. See *id.*; see also *United States v. Grayson*, 438 U.S. 41, 46 (1978)

Approximately a century ago, a reform movement asserting that the purpose of incarceration, and therefore the guiding consideration in sentencing, should be rehabilitation of the offender, dramatically altered the approach to sentencing. A fundamental proposal of this movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for or actual rehabilitation and their likely recidivism.

Id.

135. See Dugger, *supra* note 112, at 402; JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 323, 337 (C.K. Ogden ed., Richard Hildreth trans., 1931) (noting that rehabilitation is the theory that some evil influence causes a criminal to stray from the social norms and break the law, and that proper punishment can cure the criminals of these evil tendencies); see also Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *LAW HIST. REV.* 113, 143 (1998) (the concept of rehabilitation is expansive); George Fisher, *The Birth of the Prison Retold*, 104 *YALE L.J.* 1235, 1278 (1995) (“It can refer to ‘moral reformation’ of the criminal, or to scaring the criminal ‘straight.’”).

136. Dugger, *supra* note 112, at 402.

criminal's return is as a law-abiding citizen.¹³⁷ Unlike dangerous criminals, an aggressive skier is not in need of reshaping or reforming. These individuals are victims of their own hobbies, blameworthy for the aggressive nature essential to their sports, but plainly not in need of rehabilitation. Like incapacitation, the theory of retribution has no application to the crime of reckless skiing.

Essentially, what everyone wants out of the criminal justice system is deterrence,¹³⁸ and society believes that punishment—or the threat of it—will deter wrong or illegal acts.¹³⁹ However, critics of deterrence claim that it has never been successfully accomplished in America.¹⁴⁰ The perception is that today's criminal justice system is simply incapable of delivering a strong enough "wallop" for there to be a legitimate deterrent effect.¹⁴¹ Such is the case with an out-of-control skier. The criminal punishment of skiers who cross the threshold of acceptable behavior has not been consistently enforced to the degree where it could have a legitimate effect on the skiing community. However, proponents of criminal punishment would argue that if legislation could address the issue and enforcement was possible, society could learn that dangerous skiing would not be tolerated.¹⁴² Nevertheless, if the law wished to eliminate or decrease the aggressive nature of skiing that exists today, putting Nathan Hall in prison was an insignificant step in that direction.

C. *The Reaction to the Hall Decision*

Because this was the first time the issue was put before a court, the *Hall* decision attracted national attention.¹⁴³ Since then, several tactics have been used to enhance skier safety awareness. After the *Hall* decision, Colorado's Attorney General, Ken Salazar, issued a warning to reckless skiers that jail and fines could be the

137. *Pell v. Procnier*, 417 U.S. 817, 823 (1974).

138. See Dugger, *supra* note 112, at 400; LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 458 (1993).

139. Bartol, *supra* note 131.

140. See Barnes, *supra* note 110, at 631; see also Bartol, *supra* note 131, at 357 ("Punishment is a very ineffective way of socializing children or controlling crime. Clinicians and psychologists have been particularly vocal in advocating the elimination of punishment and the encouragement of more humane methods of socialization.").

141. Dugger, *supra* note 112, at 400.

142. An analogy to this would be society's awareness that driving too fast leads to sanctions. Although this does not alleviate the problem of speeding entirely, it does have the effect of making people drive slower for fear of receiving a ticket.

143. See generally Blevins, *supra* note 88; *Dateline* (NBC television broadcast, Jan. 30, 2001) (discussing the uniqueness and effect that the *Hall* case will have on the sport of skiing).

consequences of mindless behavior on the slopes.¹⁴⁴ National Safety Week, sponsored by the National Ski Areas Association, took on added significance in Colorado after Nathan Hall's conviction for the death of Alan Cobb.¹⁴⁵ Several ski resorts have subsequently taken measures to ensure safer skiing.¹⁴⁶ Despite the increased safety measures, the fact remains that society has embraced a riskier culture. As extreme sports continue to grow in popularity, more participants will adopt its risk-taking mentality.

D. Is There a Solution?

Presently, there is no system in place that has the ability to rate or classify the skill level of individual skiers.¹⁴⁷ As a result, nothing other than common sense prevents a first time skier from taking the lift to the most difficult trail on the mountain and subsequently attempting to descend that slope.¹⁴⁸ Even with the existing law acknowledging the inherent risks in skiing, there continues to be no requirement for skiing classes or instructions.¹⁴⁹ Any person can attempt to go skiing without even the most minimal training or instruction.

144. See Deborah Frazier, *Salazar Warns Reckless Skiers*, ROCKY MTN. NEWS, Dec. 5, 2000, at 12A (quoting Attorney General Ken Salazar: "We add our voices to that effort by reminding those who would endanger the health or safety of fellow skiers that their conduct [may] have personal consequences.").

145. See Willoughby, *supra* note 122 (noting that since Hall's conviction, slope safety is being scrutinized now more than ever before).

146. See, e.g., Johnson, *supra* note 121 (noting that since the accident there are speed patrols that take ski passes from habitual speed offenders); Willoughby, *supra* note 122 ("Vail has taken measures in the past few years to increase the presence of its ski patrol and has instituted a separate speeder control unit strategically placed in high-traffic areas of the mountain to encourage safe skiing."); Bill Johnson, *Obviously You All Don't Agree With Me About Hall*, ROCKY MTN. NEWS, Nov. 24, 2000, at 6A ("[T]he Snowmass Ski Area has announced it has hired five off-duty cops to nab skiers or snowboarders who break rules.").

147. To the contrary, individual participants are supposed to know their own skill level and are under a good faith responsibility to ski within that ability. See *supra* notes 81-82 and accompanying text.

148. Although there is no universal, absolute standard for determining the grade, width, and level of difficulty of the relevant slopes, the industry typically follows a classification scheme where slopes are marked (albeit not always consistently or clearly) by level of difficulty. These standards are typically in the form of a green circle designating the easiest, a blue square for more difficult, black diamond for most difficult, and double black diamond for experts only. See Chalat, *Liability of Skier for Collision with Another Skier*, *supra* note 24, at 14-15.

149. However, some ski resorts require that skiers, who have had their passes revoked for skiing out of control, attend a ski class prior to returning to the slopes. See Lipsher, *supra* note 81.

Collisions frequently occur because of the clash between the experienced skier and the novice.¹⁵⁰ Without a licensing requirement or a classification scheme that declares the ability of an individual skier, the freedom exists for inadequate or inexperienced skiers to try their luck with trails that are beyond their skill level or ability. In addition, this also creates the situation when a novice, struggling with the difficulty of a slope, and an expert, descending at a high rate of speed, share the same trail. Analogous to this situation is the car travelling at thirty-five miles per hour on a highway with vehicles traveling at seventy miles per hour.

1. *Proposal—Skiing Classes and Licensing Requirements—* Legislation that requires skiing classes and licensing requirements can potentially solve some of the safety problems that exist in the sport today.¹⁵¹ By creating a licensing system that requires the passing of a uniform skiing class, the ski industry can monitor and regulate who is permitted to ski and at what level of difficulty.¹⁵² In addition to this instructional requirement, a classification system based on level of ability and experience can be created that will allow for ski resorts to prevent skiers who are incapable of descending a difficult trail from doing so, and thereby prevent a potentially dangerous situation.¹⁵³

A licensing requirement will create a system in which inappropriate behavior can be sanctioned prior to injury or death. Under the present state of the law, a reckless skier is not threatened with sanctions unless that person harms another.¹⁵⁴ However, by requiring every skier to carry with them a license similar to a driving license, a reckless skier can be stopped by ski patrol and be given a citation or fine for his behavior. In addition, a record can

150. See, e.g., *People v. Hall*, 999 P.2d 207, 223 (2000) (Hall was considered an expert, Cobb a novice).

151. Of course, this system would not be intended to take the fun out of the sport. Its goal would be to help eliminate the unnecessary dangers and risks of skiing without becoming too restrictive.

152. These classes can include instructions on techniques, dangers, duties, liabilities, and laws, thus serving as a warning to participants for inappropriate conduct. The details of this system could be decided by the National Ski Patrol, a federally funded organization designed for preventing accidents, promoting safety programs and rendering speedy assistance to the injured. See National Ski Patrol's website, available at <http://www.nsp.org/WhatWeAre/Mission/> (last visited Jan. 29, 2001).

153. For example, with a licensing requirement that rates skill level, the resort can have a reliable way of preventing novice skiers from going down black diamond trails.

154. Today, the typical worst-case scenario is having the ski patrol take a skier's lift ticket, putting an early end to that skier's day.

be created that tracks the frequency of inappropriate behavior on the slopes. This would serve as a deterrent to those contemplating what would be considered a deviant run down the slope.

These additional regulations are not too intrusive on the freedom of the skier.¹⁵⁵ This is not an attempt to overregulate the industry, but to produce a system that helps to eliminate the sources of negligence and recklessness on the ski slopes. With the expanding world of extreme sports, this licensing system could serve as a shield from those who wish to engage in their hazardous behavior at the expense to those around them.

The logistics of implementing such regulations are likely an area of concern. Consistent enforcement of these regulations would require a significant increase in manpower, such as more ski patrol members. However, the costs of enforcement may be alleviated by the revenue generated from the fees collected pursuant to the licensing requirements, the mandatory classes, and the fines levied for deviant behavior on the slopes.

2. *Mandatory Helmets*—As a safety measure, a helmet requirement, although a fashion taboo, may prove successful in preventing serious injuries or saving lives. As the equipment in the industry continues to improve,¹⁵⁶ so should the safety. Studies show that the majority of downhill skiing fatalities involve head injuries, and some of these deaths may have been prevented if helmets were worn.¹⁵⁷

3. *Opposition to Further Regulation*—These proposals are sure to face strong opposition from both the ski industry and the ski community. In previous years, legislation has been proposed regarding ski safety.¹⁵⁸ In 1991, New Jersey almost passed a bill that required children under the age of 14 to wear helmets and would

155. Some advocates of skier safety would likely support the proposal of such regulations. See, e.g., Al Greenberg, *Is Skiing Overregulated?*, *SKIING*, Apr. 1989, at 12 ("Freedom on the slopes is important, but so are minimal safety precautions. What we have is a far cry from overregulation.").

156. Such as the evolution of the ski from wood to carbon fiber.

157. See, e.g., Marty Duda, *Study Links Deaths to Speed in Alpine Skiing*, Vol. 17 No. 2 *PHYSICIAN & SPORTSMEDICINE* 47 (1989) (showing that 82% of deaths involved head injuries, but only one of those skiers who died was wearing a helmet); Betsy Wade, *Staying Safe on the Mountain*, *N.Y. TIMES*, Jan. 9, 2000, at 5 (noting a study that found that 44% of the head injuries would have been prevented or reduced in severity by a helmet). But see Robert E. Hunter, *Skiing Injuries*, Vol. 27 No. 3 *AM. J. SPORTS MED.* 381, 387 (1999) ("Head and spine injuries account for approximately 7% of alpine trauma. . . . To date, there are [sic] little data that would suggest that helmets have, in fact, reduced injury rate.").

158. See Carolyn Lochhead, *Skiing Safety Bill Creates a Storm*, *INSIGHT*, Mar. 11, 1991, at 58.

divide all ski areas into two sections: one suitable for "limited experience" skiers and one for "all other" skiers.¹⁵⁹ The opponents of the bill successfully argued that its passing would expose ski area operators to unlimited liability for accidents, thus rendering New Jersey ski areas uninsurable.¹⁶⁰ The scheme to divide the ski areas into two sections became an issue because of the potential for massive liability, which in turn meant insurance carriers would refuse to cover ski areas.¹⁶¹

A major shortcoming of this bill was that it did not provide for a system that could compensate for the logistical problems that it would create.¹⁶² Problems with financing and enforcement led to the bill's demise.¹⁶³ In short, this bill did not attempt to regulate the individual skier with classes and licensing requirements, but instead sought to impose the burden on the ski resorts.

Further, the bill faced strong opposition regarding the helmet requirement. Opponents were concerned about studies that showed that, for children especially, the added weight of helmets could increase neck and spinal cord injuries during falls.¹⁶⁴ Additional arguments were made that helmets restricted hearing and peripheral vision, and that helmets encouraged participants to ski in an aggressive manner from which they would otherwise refrain without the false sense of security the helmet provides.¹⁶⁵

4. *Ski Community Involvement*—The skiing community might feel that its sport has been violated by regulations that do no more than instill parameters on a recreational activity that was defined by its freedom.¹⁶⁶ Additionally, it might argue that the attempt to bring order to the slopes is nothing but a managerial and

159. *Id.*

160. *Id.*

161. *Id.* at 59 (noting that any skier who is injured could allege that the slope obviously was not suitable for him).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (noting that criticisms of the bill were that it ignored more common skiing injuries and would encourage teenage skiers, now equipped with a helmet and a false sense of security, to engage in reckless conduct); see generally Brendan I. Koerner, *Ski Injury Rate Falls, Serious Accidents Rise*, U.S. NEWS & WORLD REP., Jan. 19, 1998, at 59 ("[I]ncreased helmet use might spur skiers to take risks they wouldn't dare dream of with bare heads.").

166. See generally Tom Wolf, *Lawsuits Could Tame Ski Slopes*, DENV. POST, Nov. 26, 2000, at I2 ("[M]any Americans see winter's snows as a liberating force, as a frontier-like challenge against which we define ourselves. Winter mountainscapes are one of the last refuges for freewheeling Westerners. Our Western winterscapes defy our society's desire to impose order on chaos.").

legal delusion.¹⁶⁷ It is true that the proposed legislation may have a nominal effect in preventing injuries. However, considering the lack of legislative involvement, any future regulations may be considered an improvement. The states would need to balance the benefits of imposing safety and the effects it might have on this billion-dollar industry.

In addition to new legislation, the skiing community itself would benefit by forming outreach programs that try to head off the attitude that is associated with the expanding extreme sports movement. If a teenager thinks it is "cool" to ski fast and jump off cliffs, then he is more likely to emulate that behavior the next time he is on the mountain.¹⁶⁸ The answer to this risk-taking phenomenon is not going to be found solely in the legislature, the judiciary, the industry, or the community, but in a collective effort.

IV. Conclusion

Let us not forget the precarious behavior apparent in today's society, and the effect that it has upon skiing and other extreme sports. On one hand, we have the *Hall* decision telling us that fast and aggressive skiing could result in prison time, and on the other, we have various forms of the mass media telling us to ski harder, jump higher, go faster. As the sport has evolved, the law has not. The present application of the *Hall* decision restricts the expressive freedom of skiers on the slopes. This directly clashes with the message sent to society by the growing extreme sports industry.

Unless the legislature addresses these changes in society, the law will continue to lag behind. In other words, the present ski law has a purely retributive effect. Unless an aggressive skier has the misfortune of colliding with another skier, he is not threatened with criminal sanctions. It is only after a collision, after someone is injured, that the aggressive skier potentially faces criminal liability.

Aggressive skiers, most likely undeterred by the freak occurrence of death on the ski slopes, will continue to ski in an unacceptable fashion. Nathan Hall's sentencing does little to deter this behavior. In actuality, this behavior is becoming even more widespread, as shown by the evolution of extreme sports in

167. See *id.* ("Their obsessions with routes and rules vainly aim to master a larger number of variables than we can ever comprehend.").

168. See generally Myra Stark, *The Extreme Generation*, BRANDWEEK, Sept. 1, 1997, at 19 ("What is crucial for marketers to see is that these sports have become the 'coolest' sports among kids."); Wilkinson, *supra* note 92 ("Not everyone makes a safe landing after taking an airborne jump on a mountain bike, but you won't see that on TV.").

America. Now is the time to create regulations that have the effect of preventing overly aggressive skiing.

The proposed regulations are not the entire solution. Legislatures need to be careful not to overstep their bounds. Skiing is a sport that prides itself on its freedom, and regulations that prove too restrictive will meet strong opposition from both the ski industry and the ski community. A system of licensing and mandatory classes will not be placing too much of a burden on the industry or the participants. However, a mandatory helmet regulation might cross the threshold of an acceptable regulation. Nevertheless, just because the skiing community does not like to wear helmets does not mean it is the wrong answer.¹⁶⁹ This is a solution that the legislature would be wise to spend time considering.

Other extreme sports have the potential to influence the behavior patterns of young skiers across the country. Before the extreme sports movement grows beyond regulatory control, the legislature should create committees for the purposes of learning about and monitoring the development of these activities. This will provide the legislature with the information that it will need to justify the regulation of these sports.

The benefits of these proposed regulations and committees would serve to increase awareness of the risks that are existent in the skiing world and potentially deter aggressive behavior. As a result, the slopes will be safer for the individual skiers as well as the skiing industry—both of which will share in the satisfaction of preventing injuries, deaths, and lawsuits.

It is neither possible nor necessary to ask whether such regulations could have prevented Nathan Hall from skiing down Vail Mountain in such an extreme fashion. What is important is for the law to try to address the issue of preventing future occurrences. To be consistent, state legislatures need to formulate certain standards that can be regularly enforced. The proposed regulations offer feasible answers to this uncharted area of the law.

169. A similar argument has been debated over the years regarding mandatory motorcycle helmet laws.
